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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 556

KORACH BROS., A LIMITED PARTNERSHIP, PETITIONER

v.

EARL W. CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals, as amended (R. 228–231, 251–252), has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was originally entered on November 25, 1947 (R. 232). On January 2, 1948, the court amended its opinion and denied petitioner's application for rehearing (R. 251–252). The petition for a writ of certiorari was filed January 29, 1948. The jurisdiction of this Court

is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Supp. V, 924 (d)), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether the Director of the Division of Liquidation, Department of Commerce, improperly concluded that petitioner, a manufacturer of apparel items, had not established that its "customary pricing patterns for related apparel items would be distorted by a requirement that [its] ceilings be the March 1942 delivered prices" rather than the March 1942 price list prices, within the meaning of clause (2) of the last paragraph of Section 205 (e) of the Emergency Price Control Act of 1942, as amended by Section 12 (b) of the Price Control Extension Act of 1946.[1]

STATUTE AND REGULATION INVOLVED

Section 12 (b) of the Price Control Extension Act of 1946, 60 Stat. 664, added to Section

[1] The Director had also concluded that petitioner had not established that it met the requirements of clause (1) of this statutory provision (R. 119–131). The court below disagreed with the Director's conclusion in this connection (R. 228–230), but since the requirements of clauses (1) and (2) are in the conjunctive, the Director's decision was upheld (R. 231–232). We believe the ruling of the court below was erroneous on the applicability of clause (1) to the present case, but for the purposes of this brief shall limit our discussion to the issue raised by petitioner.

205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App., Supp. V, 925) the following paragraph:

> The Administrator shall not institute or maintain any enforcement action under this subsection against any manufacturer of apparel items where the Administrator shall determine (1) that the transactions on which such proceeding is based consisted of the manufacturer's selling such an item at his published March 1942 price list prices instead of his March 1942 delivered prices, and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceilings be the March 1942 delivered prices.[2] The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with Sections 203 and 204.

The particular portion of Revised Maximum Price Regulation No. 287—Manufacturers' Prices for Women's, Girls', Children's, and Toddlers' Outerwear Garments (8 F. R. 9122) here involved is set forth in the Appendix, *infra,* pp. 14–15.

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[2] By The Supplemental Appropriation Act, 1948 (P. L. 271, 80th Cong., 1st sess. (July 30, 1947)), the following sentence was inserted at the point indicated: "The Administrator shall not be required to make any determination under this section unless the manufacturer makes application to the Administrator for such determination within sixty days after the date of this enactment, or within sixty days after institution of the enforcement

STATEMENT

Petitioner, a manufacturer of misses' and junior misses' dresses, is the defendant in a civil action instituted by the Price Administrator under Section 205 (e) of the Emergency Price Control Act, charging violations of Revised Maximum Price Regulation 287[3] (R. 2–3, 11–16). The alleged violations consisted of sales of dresses at $57, $60 and $66 per dozen, while under the regulation petitioner was prohibited from selling any dresses at more than $45 per dozen, since that was the highest price line in which it made deliveries in March 1942.[4] On August 21, 1946, petitioner filed with the Director of the Division of Liquidation, Department of Commerce, an application for a determination that the sales alleged as violations in the enforcement action came within the provisions of the last paragraph of Section 205 (e) of the Emergency Price Control Act, as amended by the Price Control Extension Act of 1946 (*supra,* p. 3), and therefore that the pending enforcement action should be dismissed (R. 1–55). After extended proceedings, including considera-

action in which such manufacturer is involved, whichever is the later."

[3] *Bowles* v. *Korach et al.*, D. C. N. D. Ill., No. 45 C 2129.

[4] There appears to be some dispute as to whether petitioner actually did make any deliveries in March 1942 of dresses in price lines higher than $45 per dozen (R. 230). This, however, is an issue of fact to be determined in the pending enforcement action, and its resolution is not essential to the present proceeding.

tion of the application by a board of review (R. 108, 121), the Director, adopting the report and recommendation of the board of review (R. 121–131), denied the application on March 21, 1947 (R. 119–120).

Thereupon a complaint was filed in the Emergency Court of Appeals seeking review of the Director's denial of the application (R. 133–196). The Emergency Court of Appeals dismissed the complaint (R. 232) on the ground that petitioner had failed to establish that its "customary pricing patterns for related apparel items would be distorted" by the prohibition in the regulation against its selling any dresses at prices higher than $45 per dozen (R. 231, 251–252). The court articulated the basis of its conclusion as follows (R. 251–252):

> * * * The pricing pattern to which the statute refers is the arrangement, design or outline of prices which a manufacturer has fixed and published for a series of related apparel items. Thus in March 1942 the complainant's published pricing pattern for misses' and junior misses' dresses was $66, $60, $57, $45, $39, $36, $30 and $24 per dozen. But so far as the prices of $66, $60 and $57 were concerned this was not a customary pricing pattern since those particular prices had never previously been included in the complainant's list of prices for such garments for a spring selling season. * * *

> Since the complainant's pricing pattern in March 1942 was clearly a new pattern for the selling season then current rather than a customary one, we need not consider whether that pattern was distorted by the application of the highest price line provisions of RMPR 287 * * *

The facts stated by the court in this portion of the opinion are undisputed. Petitioner has limited its attack to the court's construction of the phrase "pricing pattern" (Pet. 3).

ARGUMENT

1. The sole issue raised by petitioner is the extremely narrow, technical one whether a cost-plus formula allegedly[5] employed by a manufacturer in fixing the prices of his apparel items over a period of years amounts to a "customary pricing

[5] The court below did not have occasion to determine whether petitioner's evidence established its allegation that it had customarily employed a specific pricing formula in fixing its prices. The Director, however, adopted (R. 120) the board of review's statement (R. 129) that "the record does not support the claim that Applicant's prices were determined by application of a fixed margin to prime costs." The board of review supported this conclusion by an analysis of the record (R. 129–130). The evidence referred to by the board of review was contained in the record of a protest previously filed by petitioner challenging the validity of the highest price line limitation contained in R. M. P. R. 287. The record of this protest proceeding was incorporated into the record of the present proceeding by order of the Director (R. 80). The denial of the protest was upheld by the Emergency Court of Appeals in *Korach Bros.* v. *Clark*, 162 F. 2d 1020, and this Court denied certiorari on October 13, 1947, No. 236, this Term.

pattern for related apparel items" within the terms of the second clause of the last paragraph of Section 205 (e) of the Emergency Price Control Act, as amended by Section 12 (b) of the Price Control Extension Act of 1946 (Pet. 3).

This is the only case before the courts in which this issue has ever been raised. No further applications under this provision of Section 205 (e) can now be filed.[6] At the present time there are pending before the Attorney General [7] seven such applications. The United States Attorney has been

[6] Clothing prices were decontrolled on November 10, 1946 (Supplementary Order No. 193, 11 F. R. 13464). Because of the one year limitation on civil enforcement actions under Section 205 (e) of the Act, the last date on which any action arising out of overceiling sales of apparel could have been instituted was November 10, 1947. Thus, under the provisions of The Supplemental Appropriation Act, 1948, P. L. 271, 80th Cong., 1st sess. (June 30, 1947), the latest date on which any application under the last paragraph of Section 205 (e) of the Act might possibly have been filed was January 9, 1948 (see note 2, p. 3, *supra*).

[7] In *Hal-Mar Dress Co.* v. *Clark*, E. C. A. No. 427, decided simultaneously with the present case, the Emergency Court of Appeals held that after May 31, 1947, under Executive Orders 9841 and 9842 (12 F. R. 2645, 2646), the Attorney General, rather than the Director of the Division of Liquidation, Department of Commerce, was the officer charged with making the determinations provided for in the last paragraph of Section 205 (e) of the Act, as amended. Accordingly, the complaint against the Director's denial of Hal-Mar's application was dismissed, and the application is now being considered by the Attorney General. (Cf. R. 231.)

authorized and directed to discontinue the enforcement actions underlying six of these applications,[8] and therefore the applications will be dismissed as moot. The seventh application pending[9] does not involve the question now raised by petitioner. Accordingly, the decision below has no importance beyond this case.

2. The court below was, we submit, clearly correct in holding that petitioner had not shown that it had a "customary pricing pattern for related apparel items" within the meaning of clause (2) of the last paragraph of Section 205 (e) of the Emergency Price Control Act, as amended by the Extension Act of 1946, the so-called "work glove amendment." In the context in which it appears in the statute, the phrase "pricing patterns for related * * * items" obviously means a relationship between prices for related items. This amendment was enacted to meet the situation in which the work glove industry found itself under the General Maximum Price Regulation.[10] For many years, work glove

[8] The actions are being withdrawn for reasons completely unrelated to the provisions of the last paragraph of Section 205 (e) of the Act. Further, there is no indication in the applications as filed that any of the applicants alleges a customary pricing formula as its "customary pricing pattern for related apparel items."

[9] Application of Hal-Mar Dress Co., see note 7, *supra*.

[10] The Senate Banking and Currency Committee, which recommended this amendment, said that it was "designed to forbid the institution or maintenance of an action by the Administrator in a situation like that brought to the atten-

manufacturers had published price lists setting forth prices for many models of work gloves, all of which were variations of one basic model. The prices for all variations were set at established differentials from that of the basic model.[11] Early in 1942, work glove manufacturers revised their price lists, raising the price for each model above that listed in their prior price lists, and maintain-

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tion of the committee by representatives of the work-glove industry. Suits are pending against several members of this industry under circumstances which in the judgment of the committee do not warrant the maintenance of an action." S. Rep. No. 1431, 79th Cong., 2d sess. (1946), p. 10. Practically identical statements are made in H. Conf. Rep. No. 2330, 79th Cong., 2d sess. (1946), p. 31, and H. Conf. Rep. No. 2629, 79th Cong., 2d sess. (1946), p. 29.

In addition to the three reports referred to, the legislative history of this amendment consists of: (1) Hearings before the Committee on Banking and Currency, House of Representatives, 79th Cong., 2d sess., on H. R. 5270, Vol. I, pp. 879–906, and Vol. II, pp. 1767–1776; (2) Hearings before the Committee on Banking and Currency, United States Senate, 79th Cong., 2d sess., on S. 2028, Vol. 2, pp. 1516–1538.

[11] See, for example, statement of Patrick J. Smith, attorney for the work glove manufacturers: "Now, we have a commodity, and it has been testified that we have in-line pricing. Where we base our prices are [sic] on 8-ounce flannel gloves. You tell a glove manufacturer a price of an 8-ounce flannel Canton glove is X cents per dozen and he can tell you then by adding or subtracting from that glove the established differentials which have been in existence for more than 25 years in the business the price of every other glove in that line, whether it is himself or his competitor." House Committee hearings, *supra*, note 10, Vol. I, p. 901.

ing the established relationships among the prices for the various related models.[12]

Work glove prices were controlled by the General Maximum Price Regulation,[13] under which the maximum price for any item was initially established at the highest price at which it was actually delivered in March 1942. If, however, no deliveries of an item were made in March 1942, the ceiling price for that item was the highest price at which it was offered for delivery in March 1942.[14] Many work glove manufacturers in March 1942 had outstanding contracts which they had entered into under their earlier price lists, and the only March 1942 deliveries of many models were made pursuant to such contracts. Accordingly, ceiling prices for these items were

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[12] Cf., e. g., statement of A. H. Mason, executive vice president of Wells Lamont Corp., a work glove manufacturer: "Periodically, prior to, and on December 1, 1941, our company issued a price list in which the historical customs and practices of price differentials were applied. * * *. On March 17, 1942, we issued another price list covering 207 styles or models of gloves, again giving effect to the historical customs and practices of price differentials." *Ibid.*, p. 902.

[13] 7 F. R. 3153.

[14] Cf. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. The validity of this method of establishing maximum prices was upheld by the Emergency Court of Appeals in *Seminole Rock & Sand Co.* v. *Fleming*, 160 F. 2d 542. The use of the March 1942 delivery test in establishing manufacturers' highest price line limitations was upheld in *Korach Bros.* v. *Clark*, *supra*, note 5, and in *Modern Manufacturing Co., Inc.* v. *Fleming*, 160 F. 2d 892 (E. C. A.).

established by the regulation at the level set forth in the earlier, rather than the 1942, price lists. As to the other, related models, however, they made deliveries in March 1942 under their 1942 price lists, or made no deliveries at all. As to these items, maximum prices were established by their 1942 price lists.[15] As a result of their having some of their prices frozen at their 1941 price list prices while others were established at the higher 1942 price list prices, the customary price differentials between variations of the same basic article were obviously distorted.[16] Some of the companies sold all their items at the 1942 price list prices, and treble damage enforcement actions

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[15] House hearings, *supra*, note 10, Vol. I p. 897; Senate hearings, *supra*, note 10, Vol. 2, p. 1529.

[16] As Senator Taft said in the course of the hearings on this amendment: "So that the result was that the higher-priced glove could have a ceiling price below a lower-priced glove." Senate Hearings, *supra*, note 10, Vol. 2, p. 1520.

Examples of this distortion were presented to Congress by representatives of the work glove industry. One company, for example, had March 1942 list prices of $6.00 and $6.25, respectively, for short cuff and long cuff work gloves. Under its earlier price list these prices were $5.50 and $5.75. Since it delivered long cuff gloves in March 1942 under an outstanding contract at its earlier list price, but made no deliveries of short cuff gloves in March 1942, its ceiling prices under the regulation were $6.00 per dozen for the short cuff glove and $5.75 for the long cuff glove, although customarily the long cuff glove had been priced at 25 cents per dozen more than the short cuff glove. House Hearings, *op. cit.*, Vol. I, p. 896; Senate Hearings, *op. cit.*, Vol. 2, p. 1529.

under Section 205 (e) of the Act were instituted against them because of such sales of models which had been delivered in March 1942 only at the earlier and low price list prices. It was to reach such cases that Congress enacted the provision under consideration.

We submit that consideration of the situation which Congress sought to meet by the statutory provision in question makes it evident that the phrase "pricing patterns for related apparel items" means "relationship between prices of related apparel items" or, in the words of the court below, an "arrangement, design or outline of prices which a manufacturer has fixed and published [17] for a series of related apparel items" (R. 251). Petitioner's alleged [18] pricing formula is a relationship between costs and prices [19] rather than a relationship between prices for different items.

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[17] The word "published" which petitioner appears to find objectionable (Pet. 5, 7) is not relevant to the present proceeding, and may be deemed as surplusage. If the court below was correct in holding that the phrase in question referred to an "arrangement, design or outline of prices * * * fixed * * * for a series of related apparel items," petitioner's application was properly denied since its customary pricing pattern, whether published or not, had never included the higher price lines which are involved in the underlying enforcement action.

[18] Cf. note 5, *supra*, p. 6.

[19] The regulation involved could not distort interrelationships of prices for related items. As stated in the report of the board of review (R. 129), adopted by the Director as his opinion (R. 120): "In [Applicant's] case it presumably delivered in March a series of style numbers at prices

CONCLUSION

The decision below is correct and the petition for a writ of certiorari presents no question warranting further review by this Court. The petition should, therefore, be denied.

Respectfully submitted.

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FEBRUARY 1948.

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in the range A, B, C, D, while its alleged price list attempted to extend the range by offering the additional range E, F, G, to give an extended pattern A, B, C, D, E, F, G. It is obvious that there is no distortion of the customary pricing pattern A, B, C, D, by the governing regulation which does no more than restrict the expansion of that pattern on the higher price side."

In view of this statement, it is difficult to understand petitioner's contention that the Emergency Court's construction of the phrase "pricing pattern" was not presented to the court by the Government (Pet. 3, 10, 27).

APPENDIX

The pertinent provisions of Revised Maximum Price Regulation No. 287 are as follows:

SECTION 3. *Pricing of garments by manufacturers* * * *[1]

(a) *Pricing chart.*—Before selling or delivering any garment priced under this regulation, the manufacturer must prepare a pricing chart containing:

(1) A list of the category[2] numbers delivered during March 1942.

(2) A list of each of the "selling price lines" delivered during March 1942, in each category number.

SECTION 7 [as amended, 9 F. R. 12591]. * * *

(a) "*Selling price line*" means the price at which a manufacturer first offered for sale to his general trade a style of garment on the occasion of its first cutting, and at which a number of garments equal to at least 5% of the number of garments contained in that cutting were delivered. On or before November 1, 1944, each seller who has a selling price line listed on his pricing

[1] This language appeared in Section 3 of unrevised MPR No. 287, 7 F. R. 10460. Its requirements were continued in effect by Section 3 of the revised regulation, 8 F. R. 9122, 9 F. R. 974.

[2] For purposes of convenience Section 27 of the regulation grouped the various types of garments in "categories," such as "Category 1—women's coats, sizes 32 and up," etc.

The sales by petitioner which are in issue were in Category 22, "misses' and Jr. misses'," dresses, "sizes from 7 to 20, inclusive."

chart which does not meet these requirements must amend his copy of the pricing chart by deleting such selling price line. Subsequent offers to sell, or sales, of the same style at higher or lower prices are not to be considered as establishing separate selling price lines. Selling prices which differ from the prices customarily established for the general trade because of discounts, allowances, or price differentials for different classes of purchasers do not constitute selling price lines. Sample sales or accommodation sales shall not be considered as establishing a selling price line.

SECTION 15 [as amended, 9 F. R. 974]. *Prohibitions.*—On and after June 29, 1943, regardless of any contract or other obligation:

(a) No manufacturer shall deliver any garments in a selling price line higher than the highest selling price line listed for a garment of the same category number on his pricing chart in effect on the date of delivery. * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1943